

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RICHARD G. WILDER**  
Claimant

VS.

**CITY OF TOPEKA**  
Self-Insured Respondent

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Docket Nos. 1,001,649  
& 1,004,830

**ORDER**

Claimant requested review of the April 28, 2005 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 4, 2005.

**APPEARANCES**

John J. Bryan of Topeka, Kansas, appeared for the claimant. Larry G. Karns of Topeka, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. Two docketed claims were consolidated for hearing. The parties agreed that the first page of the ALJ's April 28, 2005 Award incorrectly listed Docket No. 1,011,649 instead of the correct Docket No. 1,001,649. The remaining pages of the ALJ's April 28, 2005 Award accurately reflect the correct Docket Nos. 1,001,649 and 1,004,830.

**ISSUES**

It was undisputed that claimant suffered personal injury by accident on June 21, 2002, but respondent denied claimant suffered a series of accidents. The ALJ found claimant aggravated a preexisting degenerative condition in his right knee as a result of the June 21, 2002 accident. But the ALJ further determined claimant had a 50 percent preexisting impairment to the right knee before he suffered accidental injury and after knee replacement surgery, according to the *AMA Guides*<sup>1</sup>, the claimant suffered a 37 percent

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

functional impairment to his right knee. Consequently, the ALJ denied claimant permanent partial disability benefits because the work-related accident did not increase the claimant's preexisting functional impairment.<sup>2</sup>

The claimant requests review of nature and extent of disability. Claimant argues he did not have a preexisting 50 percent functional impairment to his right knee because he was able to work and did not have any physical restrictions before the June 21, 2002 accidents. Claimant further argues the doctor who opined he had a 50 percent preexisting impairment did not follow the proper procedure outlined in the *AMA Guides* for taking x-rays in order to make his determination that claimant did not have any cartilage and was bone on bone in his right knee.<sup>3</sup> Consequently, claimant requests the Board to find he has suffered a 37 percent impairment of function to the right knee due to his work-related injury and knee replacement. In the alternative, claimant argues the preexisting impairment in his right knee would be between 0 and 2 percent, at most.

Respondent argues claimant had scheduled the right knee replacement surgery before the accidents on June 21, 2002, and accordingly, those incidents did not aggravate or accelerate the need for surgery. Therefore, respondent argues claimant failed to meet his burden of proof that the right knee replacement surgery was causally related to his accidents at work. Finally, respondent requests the Board to affirm the ALJ's finding claimant suffered a preexisting 50 percent functional impairment to the right knee and a 37 percent functional impairment after the right knee replacement surgery. Because there was no additional impairment to the knee after the work-related accidents the claimant is not entitled to an award of permanent partial disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is 55 years old and has worked for respondent since September 1985. For the last 10 years, claimant has operated equipment for respondent. Claimant is 5 foot 6 inches tall and weighs 320-335 pounds. He has experienced bilateral knee problems for a number of years due to degenerative joint disease. Claimant had an arthroscopic right medial meniscectomy on December 30, 1992. In May 2000 claimant sought medical treatment with Dr. Joseph Mumford for complaints of bilateral knee pain. X-rays revealed osteoarthritis of both knees and that claimant was basically bone on bone in both knees. The doctor noted the objective radiographic findings in both knees were symmetrical. On

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<sup>2</sup> See K.S.A. 44-501(c).

<sup>3</sup> This argument was briefed by claimant's attorney with references to the *AMA Guides* that were not part of the evidentiary record nor particularly addressed by the testifying physicians.

September 29, 2000 claimant underwent a surgical left total knee replacement arthroplasty. All of the surgeries on claimant's right knee were performed by Dr. Mumford.

Consequently, before any of the alleged accidents involved in these claims, claimant had a left knee replacement and was experiencing symptoms in his right knee. Furthermore, Dr. Mumford had advised claimant that he would eventually need a right knee replacement. In fact, on December 18, 2001, claimant had seen Dr. Jeffrey Conrow for right knee complaints and the doctor recommended a right knee replacement.

Q. Now, a month before that you been in to see Dr. Conrow on December the 18th, '01?

A. Mm - hmm.

Q. Do you recall that?

A. Yes.

Q. And he discussed with you at that time you were there telling him that you were there today to discuss your right knee, do you recall that?

A. Yes.

Q. So you were having problems with your right knee at that time and do you recall what the doctor recommended for you at that time, what Dr. Conrow recommended?

A. He mentioned that I probably would have to have a total knee.<sup>4</sup>

On January 14, 2002, claimant twisted his right knee while hurrying to help a coworker from a ditch that was beginning to collapse. At the time of the incident, claimant heard his right knee pop and he felt severe pain. Claimant reported the incident to his foreman and the next day prepared an accident report. But the claimant did not seek any medical treatment at that time. Nor did claimant seek medical treatment for his right knee until he next saw Dr. Mumford.

On May 13, 2002, claimant saw Dr. Mumford for increasing right knee pain. The doctor did not recall the claimant mentioning any injury at that time. X-rays were taken of both knees and it was noted the right knee had advanced varus arthrosis with complete loss of medial articular shadow.<sup>5</sup> The doctor offered to do the right knee replacement.

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<sup>4</sup> P.H. Trans. at 22.

<sup>5</sup> Mumford Depo. (Aug. 23, 2002), Ex. 3.

According to Dr. Mumford, claimant agreed to have the surgery and that they would select a mutually convenient date in the near future.

On June 21, 2002, claimant twisted and injured his right knee when he jumped out of the way of a large pipe that had fallen from a fork lift. Later in the day, claimant twisted his knee again when another pipe rolled off the fork lift. Within minutes of the second incident, claimant advised his supervisor he was going to the hospital emergency room. Claimant then sought medical treatment for the pain and swelling in his right knee. Claimant was taken off work, provided Darvocet and instructed to follow up with an orthopedist. On July 1, 2002, claimant was examined by Dr. Mumford and again it was determined that a mutually convenient date would be established for the recommended right knee arthroplasty. On July 15, 2002, the doctor prescribed a knee brace for claimant's right knee to enable claimant to continue working.

The respondent disputed that the recommended surgery was related to the incidents at work and the matter proceeded to preliminary hearing where the ALJ determined claimant had aggravated his preexisting right knee condition. Respondent was ordered to provide claimant medical treatment with Dr. Mumford. On review, the Board concluded claimant injured his right knee in the June 21, 2002 incidents and his right knee symptoms were aggravated. Consequently, the Board affirmed the ALJ's determination claimant was entitled to medical benefits for the June 21, 2002 accidents and resulting right knee injury.

On December 20, 2002, Dr. Mumford performed a surgical right total knee replacement arthroplasty on claimant. At the time of regular hearing, the claimant had returned to work for respondent and was seeking an award for his functional impairment.

On February 13, 2004, claimant was seen by Dr. Edward J. Prostic, at his attorney's request. Dr. Prostic opined that claimant's right knee condition was aggravated by the incidents on June 21, 2002. The doctor rated claimant's right knee at 37.5 percent.

On cross-examination, Dr. Prostic agreed that when claimant had his left knee arthroplasty in 2000 the x-rays revealed bone on bone and those findings were the same for the right knee. The doctor further agreed that if there is bone on bone with no cartilage interval the rating is 50 percent to the knee and if there is a good result with arthroplasty the rating is reduced to 37 percent according to the *AMA Guides*. Dr. Prostic further agreed that if surgery had already been prescribed a twisting event to the knee would not accelerate the need for surgery.

Q. If a person already had had the surgery prescribed by a physician or recommended by a physician or scheduled the surgery prior to having a twisting event to their knee, then would you say that the twisting event actually had accelerated the need for the knee surgery?

A. No.<sup>6</sup>

However, Dr. Prostic also agreed that, in general, if a patient has no symptoms then there would be no impairment.

Dr. Mumford, the treating physician, opined claimant had a preexisting 2 percent functional impairment to the right knee based upon the *AMA Guides* for the meniscectomy he performed on claimant's right knee in 1992. The doctor further opined that based upon his examination and radiological examination of claimant's right knee on May 5, 2000, the claimant had a preexisting 50 percent functional impairment.

The Workers Compensation Act provides that if an accident aggravates a preexisting condition the injured worker's recovery is limited to the extent the injury causes increased disability. Moreover, compensation awards must be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>7</sup>

And functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.

K.S.A. 44-510e(a) requires that functional impairment be determined based upon *AMA Guides*, Fourth Edition. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria and this approach has been upheld by the Court of Appeals.<sup>8</sup> The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

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<sup>6</sup> Prostic Depo. at 21.

<sup>7</sup> K.S.A. 44-501(c) (Furse 2000).

<sup>8</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

Under the unique factual circumstances of this case, both Drs. Prostic and Mumford noted that before the claimant's work-related accidents x-rays had revealed bone on bone in his right knee. Both doctors agreed that under the *AMA Guides* such condition was ratable as a 50 percent functional impairment. And both doctors as well as Dr. Bieri, the court ordered independent medical examiner, agreed that following a surgical total knee replacement, the claimant's right knee rated a 37 percent functional impairment pursuant to the *AMA Guides*.

Consequently, the claimant's discrete injuries to his right knee did not result in any increased disability and the Board affirms the ALJ's finding claimant is not entitled to any additional permanent partial disability compensation.

Respondent next argues that because the total knee replacement had not only been recommended but also agreed to by claimant before the work-related accidents, such surgery was not caused by the accidents. Consequently, respondent further argues it should not be liable for the claimant's right knee surgery. The Board agrees.

Knee replacement surgery had been recommended before the first accident in January 2002. And claimant never sought treatment for that particular incident. Claimant then sought treatment in May 2002 and again knee replacement surgery was recommended and agreed to by claimant. In June 2002 claimant again suffered two discrete twisting type injuries to his right knee. All three of claimant's injuries to his right knee were described as twisting incidents. As previously noted, Dr. Prostic agreed claimant's twisting injuries to his right knee did not accelerate the need for claimant's knee replacement surgery which had already been recommended and agreed to by claimant. Based upon this record it cannot be said that the claimant's work-related knee injuries accelerated, intensified or aggravated the knee condition to the extent that surgery was required. Such surgery had already been recommended and agreed to by claimant. Consequently, respondent's liability under these claims is limited to the medical treatment for the temporary aggravation to claimant's right knee suffered following the injuries in June 2002 but respondent is not liable for the expenses of claimant's right knee replacement surgery.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 28, 2005, is modified to reflect respondent is not liable for the expenses of claimant's right knee replacement surgery and affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Larry G. Karns, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director